**IN THE UNITED STATES DISTRICT COURT**
**FOR THE MIDDLE DISTRICT OF TENNESSEE**
**NASHVILLE DIVISION**

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| SENTINEL TRUST COMPANY, Danny N. Bates, Clifton T. Bates, Howard H. Cochran, Bradley S. Lancaster, and Gary L. O'Brien | ) | |
| *Plaintiffs* | ) | Civil Action No.: |
| v. | ) | 3-04-0836 |
| KEVIN P. LAVENDER, Tennessee Commissioner of Financial Institutions | ) | JUDGE NIXON |
| *Defendant* | ) | |

## PLAINTIFFS' REPLY BRIEF RE: TEMPORARY RESTRAINING ORDER

Defendant Commissioner's "Response to Request for Injunctive Relief" having been posted on his web site late last Friday, Plaintiff must take this unusual step of submitting a reply brief during the time of the Court's consideration of whether to issue an *ex parte* Temporary Restraining Order.

Such is essential because there are points about Defendant's Response that Plaintiffs have a vital interest in bringing to the Court's attention:

1st: Though advised by the prayers of the complaint, the closing sentence of Plaintiffs' brief, and the letter of transmittal to the Clerk giving dates both attorneys could be available for argument on either a T.R.O. or preliminary injunction, a hearing on the latter being prayed as a part of the requested T.R.O., Plaintiffs indicated a desire to argue on the T.R.O. application if the Court should

order argument either *sua sponte* or at the request of the Attorney-General. Instead of requesting to be heard, the Attorney-General elected to submit the Response.

2nd: Plaintiff's motion for a restraining order followed by an early hearing and a preliminary injunction were well-supported by affidavits: The entire petition was sworn, a new affidavit was filed in support of the complaint, with copies of earlier affidavits sworn by Plaintiff Bates. The T.R.O. Motion adopted as its basis all such filings, so that the motion was supported by affidavit. Under Rules, 43(e) and 6(e) F.R.Civ.P., Defendant was free to file responsive affidavits, but elected not to do so, leaving all important sworn allegations without attempted refutation, so they should be taken as unquestionably true for T.R.O. consideration. Hence the mass of allegations are undisputed for purposes of considering the application for immediate injunctive relief. These include the facts that at the **only** hearing held to date, the Chancery Court did not apply any part of Tennessee's law of statutory construction, but merely accepted the Attorney-General's insistence that the desired expansion of power was mandated by a single statutory sentence in isolation and in disregard of all other relevant provisions, contrary to Tennessee's (and every American jurisdiction's) law of statutory construction. It is indisputable that the only way one can get from the text to the Commissioner's desired objective is by applying the law the Chancery Court refused to apply. The plain meaning rule dictates that language saying you are empowered to do this to a "bank" doesn't mean you can do it to a non-bank. This is dictated by simple literacy and allowing the words and their meaning to enter the thinker's mind.

3rd: Absent defensive affidavits, most of Defendant Commissioner's brief, on its face, was imported through the modern digital computer's magic of block-copying into the current brief, obviously from a previous Chancery Court filing. Defendant didn't even bother to change the name of the court in which the matter is pending (the Reply being replete with references to a record filed in the Chancery Court). The result is that the Response contains many statements of a factual nature that simply are not a part of this Court's record. Hence, much of the response goes outside the record. Such statements are nothing more than the Defendant Commissioner's beliefs, and some of them distort the facts by selectively presenting the part the defense wishes to emphasize. While they do not warrant any consideration by the Court, attorneys for one party can never know what effect such

inappropriate statements may have, so Plaintiff will make brief explanatory statements herein on some of the more important ones *(infra,* pp. 5-6).

However, things of a factual nature may be included in such a Response that are appropriate even without affidavit proof—Concessions. Where the Complaint could only present an information and belief allegations that Defendant was in the process of allowing "several" banks to examine "bid packages" and Sentinel records in Sentinel's Nashville office during the week of September 13-19, 2004, Defendant has conceded that there are 5-6 entities that have qualified to bid and that their deadline for submitting offers is noon on the day after tomorrow, September 22, 2004 (Reply, p. 35). This proves the imminence of loss to Plaintiff, because all the Defendant has to do is select his choice and follow the statute's directions for disposing of properties of a seized **bank,** by seeking an *ex parte* signature of approval from the judge holding Chancery Court in Hohenwald, which could permissibly be done at any hour of the day or night.

The only thing Defendant seeks to brand as a defect in Plaintiffs' case that has any degree of seriousness is reference to the *Rooker-Feldman* rule, the common name of the doctrine reflecting federal law that vests no jurisdiction to review final state court judgment in any Federal Court but the Supreme Court, *Rooker v. Fidelity Trust Co.,* 263 U.S. 413, 44 S. Ct. 149, 68 L. Ed. 362, (1923) and *District of Columbia Court of Appeals v. Feldman,* 263 U.S. 413, 44 S. Ct. 149, 68 L. Ed. 362, (1923), each[1] of which involved an attempt to achieve relief contrary to a **final** state judgment.

A thoughtful reading of the Complaint will demonstrate that it carefully avoided trying to obtain review of any Tennessee judgment, not even attaching copies of the Chancery Court ruling, but accurately describing it, by quotation, as failing to apply the rule of statutory construction forbidding the use of a single, isolated provision, and the truthful fact that the Court's memorandum

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[1]In *Rooker,* the Supreme Court said, in part: "It affirmatively appears from the bill that the judgment was rendered in a cause wherein the circuit court had jurisdiction of both the subject matter and the parties; that a full hearing was had therein; that the judgment was responsive to the issues, and that it was affirmed by the Supreme Court of the State on an appeal by the plaintiffs. . . . Unless and until so reversed or modified, it would be an effective and conclusive adjudication." (263 U.S., at 415, 44 S. Ct., at 150, 68 L. Ed., at 365.

order didn't even *purport* to apply **any** rule of statutory construction. It was Defendant who attached a copy of that order,[2] appearing to seek appellate affirmation. Both as to *Rooker-Feldman* and the defensive claim of an adequate state remedy, the Complaint proves Plaintiffs knocked at the door of the state court, which neglected to follow or even mention the body of controlling law, statutory construction, and Plaintiffs then sought discretionary appeal, only to find rejection by the Tennessee Court of Appeals—which declined jurisdiction to adjudicate, but stated its view that the destruction of a $4 million business could await eventual appellate review after completion of the *certiorari* trial, when Sentinel's valuable business will long since have been destroyed. The Attorney-General is willing to disregard the fact that the appellate court's treatment of the case establishes that it adjudicated nothing, but that the attempted appeal was merely interlocutory. As alleged, under Tennessee law, every interlocutory order lacks finality and is unappealable until all issues have been disposed of as to all parties. It is the interlocutory nature of the only hearing held and the fact that refusal to follow the law rendered the hearing non-meaningful that proves the lack of any timely hearing *invoked by Tennessee* that renders unconstitutional this a final seizure without providing a due process hearing as a predicate for the action.

The essential due process hearing **before** the destruction of property rights has not been accorded by Tennessee and will not be accorded at all, in time to save this valuable property from being totally lost to its owner, unless this Court shall save it by the use of its injunctive powers. The prior hearing before property destruction was held requisite by *Wolff v. McDonald,* 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974), extending this protection to a liberty on the ground that it has always been a due process predicate to a final property seizure by a state.[3]

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[2]Response Appendix, third document.

[3] "This analysis as to liberty parallels the accepted due process analysis as to property. The Court has consistently held that some kind of hearing is required at some time before a person is finally deprived of his property interests. *Anti-Fascist Committee v. McGrath, 341 U.S. 123, 168 (1951)* (Frankfurter, J., concurring). The requirement for some kind of a hearing applies to the taking of private property, *Grannis v. Ordean, 234 U.S. 385 (1914),* the revocation of licenses, *In re Ruffalo, 390 U.S. 544 (1968),* the operation of state dispute-settlement mechanisms, when one person seeks to take property from another, or to government-created jobs held, absent 'cause' for termination, *Board of Regents v. Roth, 408 U.S. 564 (1972); Arnett*

Plaintiffs insist that they have shown adequate basis for a temporary restraining order, the only way to prevent the certain destruction of their property on or soon after Wednesday of this week. They now wish to point to a few mistaken or misleading insistencies by Defendant in its Response, with indications of some contradictory proof that would be available at a preliminary injunction hearing:

- The Response charges that the Whisenant affidavit is supported by a 2002 audit, knowing full well that such is the audit on which the Commissioner relied, and that Whisenant also reviewed the assumptions in the Commissioner's findings. Such audits were demanded by the Commissioner, and a subsequent more favorable Krafft Bros. 2003 audit was completed but not released because the Commissioner would not pay for it, having seized Sentinel's assets.

- Comment that Bates failed to critique Commissioner's report following meeting with Bates and Attorney Kilgore—Bates affirmed there were inaccuracies in report, the Commissioner's representative telephonically demanded that the written response be furnished that day because the Commissioner intended to post his report on his web site that day, but Defendant's representative declined to give assurance that such response would also be posted, so Plaintiff's decided to let the Commissioner discover and correct his own errors, as was his responsibility.

- Defendant asserts Waller, Lansden, Dortch & Davis demanded Bates resign his Sentinel offices; actually, after the occurrence of whatever transpired between the Commissioner and Waller-Lansden lawyers, Waller-Lansden stated it would resign unless Bates terminated his positions (although Bates *owned* Sentinel except for his wife's small stock holding), and Sentinel's board accepted Waller-Lansden's resignation. It appears unbelievable that, as Defendant avers, a law firm of such high repute and abilities would both admit that the using

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*v. Kennedy, 416 U.S. 134, 164 (1974)* (POWELL, J., concurring); *id., at 171* (WHITE, J., concurring in part and dissenting in part); *id., at 206* (MARSHALL, J., dissenting). Cf. *Stanley v. Illinois, 405 U.S. 645, 652-654 (1972); Bell v. Burson, 402 U.S. 535 (1971).*" (418 U.S., at 558, 94 S. Ct., at 2975-2976, 41 L. Ed. 2d, at 952).

of pooled trust funds to finance required litigation was inappropriate, and immediately ask a state law-enforcement official if Sentinel could continue doing it anyway! This, coupled with the Commissioner's ban against Sentinel's former counsel giving information, and Waller-Lansden accepting and even suggesting that ban, blocked Plaintiff's new counsel from questioning those lawyers on what actually transpired in the meeting with Defendant. This cries out for explanation, when Waller-Lansden received over $4 million in fees disbursed from pooled trust funds against future liquidation collections to be achieved by Waller-Lansden, and when such temporary use of trust funds is clearly contemplated as legitimate by T.C.A. § 45-2-1003(c), definitionally made applicable to trust companies by 45-2-1001.

- Defendant indicates undue delay by Plaintiff's counsel in seeking to defend Plaintiffs from Defendant's unwarranted attack, although Defendant knows, from the Chancery hearing, that after Waller-Lansden resigned, Sentinel then employed a firm with banking expertise, Miller & Martin, who considered themselves to have been fired by the new attorneys hired by the Commissioner's Receiver, and Bates did not meet with present counsel until May 25, nor retain him until June 1.[4]

Defendant Commissioner's entire position is unreal. Pretending that "bank" has been redefined to include "trust company" when both the pre-1999 Act and the amendment of the same

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[4]It is represented that the Chancery hearing transcript records the following statement by undersigned counsel: "So Sentinel first telephones me on May 21st on a late Friday afternoon. I first meet with them on May 25th. And Your Honor may not believe it, but I don't know a thing about banking law. I don't know a thing about how trust companies are operated. So it takes a time for me to educate myself. But I have to file an answer to the administrative proceeding by June 2nd. So on June 1st, Sentinel and Mr. Bates as its president signed a retainer agreement and paid the price that goes with it, and by June 3rd, I have prepared a special appearance denying that the administrative law judge, administrative judge rather, had any jurisdiction because the commissioner in fact wasn't proceeding under this section because the thing is not a bank." (August 4, 2005 transcript, pp. 54-55)

year speak of both banks and trust companies is internally inconsistent, and when the 1999 amendment failed to re-define "bank" as including "trust company," but continued their definitional separation, T.C.A. § 45-1-103. Such thinking would lead to absurd results: *(i)* Applying to trust companies the statutory prohibition against banks being closed more than 2 successive days, when trust companies keep no vault cash and the public never needs access to them to withdraw money; *(ii)* applying bank reserve requirements to trust companies when a trust company handling bond issues never has need for *any* reserves, because each year it receives from every bond issuer the full amount it is required to distribute to bond-holders; and *(iii)* pretending that the Commissioner's power to construe the statutes he administers empowers him to disregard all Tennessee law governing the only proper mode of determining a statute's meaning.

This in truth is the Defendant Commissioner's position: He can arrogate to himself any power he desires, he can assign to a statute any meaning that fits his philosophy, totally disregarding, and refusing to think about, textual language, and he can act with finality without any prior hearing, under a statute which purports to authorize this only for the protection of "depositors" when he knows full well that *no trust company* has depositors. This is precisely the type of arbitrary and officious imposition of individual will instead of government by the law of the land that is forbidden by the due process clauses, see Plaintiff's brief, p. 3, quoting *Dent v. West Virginia*, 129 U.S. 114, 9 S. Ct. 231, 32 L. Ed. 623 (1889).

No one can appreciate the sub-conscious pressure that may affect any state judge's independence in thought when asked to sit in judgment on official actions of state government at its highest level. This is the prime reason for providing federal jurisdiction in diversity of citizenship cases, and for such statutes as 42 U.S.C. § 1983, empowering every federal judge to determine whether state officials, under color of their offices and law, destroy private property without due process of state law.

It is respectfully insisted that unless justice be granted here and now, it can never be granted at all. The unwarranted pretense that state law authorizes that which the statutory text plainly does not authorize is the very essence of acting *under color* of law, just as a deed from a non-owner is the essence of *color* of title. The issuance of a Restraining Order as prayed, preserving the *status quo*

to allow this Court more time for deliberate study following the communicational superiority of oral argument, is essential to prevent Defendant Commissioner from imposing commercial capital punishment upon Sentinel without either substantive or procedural due process of law.

Respectfully submitted,

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**Certificate of Service**

It is hereby certified that on this September 20, 2004, a copy of the foregoing brief has been delivered to the offices of JANET M. KLEINFELTER, ESQ., Senior Counsel, Financial Division, Attorney-General of Tennessee, 425 Fifth Avenue, North, Nashville, Tennessee 37243.